7-7-1966

In re Romano

Roger J. Traynor

trial court and jury witnessed both films, which clearly demonstrated that petitioner had lied to his models and that he did in fact photograph their private parts. The above related evidence considered in the light of petitioner's profession would plainly support a conclusion by the jury that he produced and possessed these films with intention to distribute and exhibit them. It follows that petitioner has failed to discharge his burden on this collateral attack on the judgment of conviction, and that the writ of habeas corpus which he seeks should be denied.

McComb, J., concurred.

[Crim. No. 9902. In Bank. July 7, 1966.]

In re CHARLES ISADORO ROMANO on Habeas Corpus.

[1] **Criminal Law—Punishment—Double Punishment.**—Where the objective of each burglary of which defendant was convicted and sentenced was the commission of a grand theft, of which he was also convicted and sentenced, the sentences for grand theft, the punishment for which is less than that for burglary, must be set aside.

[2] **Id.—Punishment—Double Punishment.**—Though two burglaries were committed pursuant to a single conspiracy, defendant may be punished for both burglaries where they were separate crimes committed at different times and places and against different victims.

[3] **Id.—Punishment—Double Punishment: Conspiracy—Punishment.**—In a prosecution for conspiracy to commit two thefts with charges of three overt acts (two burglaries and possession of goods stolen in the burglaries), defendant could not be punished for both the burglaries and the conspiracy unless it had a broader objective than the burglaries and thefts; and though evidence of other crimes was introduced, the jury could not have found defendant guilty of conspiracy with an objective broader than that charged under an instruction that evi-

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[1] See **Cal.Jur.2d**, Criminal Law, § 1475; **Am.Jur.2d**, Criminal Law, § 612.

McK. Dig. References: [1, 2] Criminal Law, § 1475; [3, 4] Criminal Law, § 1475; Conspiracy, § 27; [5] Conspiracy, § 26; [6] Habeas Corpus, § 34(5)(e).

dence of other crimes could not be considered to prove distinct offenses or continual criminality, but only to show identity, motive, intent, ability, knowledge, or common scheme.

[4a, 4b] **Id. — Punishment — Double Punishment: Conspiracy — Punishment.**—Where defendant was convicted of and sentenced for two thefts, conspiracy to commit the thefts, and burglaries committed in furtherance of the conspiracy to commit the thefts, he could not be punished for both the burglaries and the conspiracy, which had no broader objective than the burglaries and thefts charged, and the sentences for theft and conspiring to commit theft were set aside, since the punishment of not more than 10 years for conspiring to commit grand theft is less than the punishment of one to 15 years for second degree burglary.

[5] **Conspiracy—Verdict.**—In a prosecution for thefts and conspiracy to commit thefts, though the jury was not instructed to find whether defendant conspired to commit the felony of grand theft or the misdemeanor of petty theft, it was clear that the jury found defendant guilty of conspiring to commit grand theft where he was convicted of the substantive crimes of grand theft.

[6] **Habeas Corpus—Grounds for Relief—Duration of Sentence—No Relief Prior to Expiration of Legal Term.**—Defendant is not entitled to release on petition for habeas corpus, though his sentences constituting double punishment are set aside, where he is held under other valid judgments of conviction.

PROCEEDING in habeas corpus to secure release from custody after judgments of conviction for burglary, grand theft and conspiracy to commit grand theft. Sentences for grand theft and conspiracy to commit grand theft set aside; order to show cause discharged and writ denied.

Charles Isadoro Romano, in pro. per., and Russell E. Parsons, under appointment by the Supreme Court, for Petitioner.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Jack K. Weber, Deputy Attorney General, for Respondent.

TRAYNOR, C. J.—Petitioner was convicted and sentenced in Kern County on one count of burglary (Pen. Code, § 459) and one count of grand theft (Pen. Code, § 487), the sentences to run concurrently. He was also convicted and sentenced in San Diego County on two counts of burglary, two counts of

grand theft, and one count of conspiring to commit theft (Pen. Code, § 182). The sentences for grand theft were to run concurrently. The sentences for each count of burglary and the one count of conspiracy were to run consecutively to each other and concurrently with the sentences for grand theft.[1] Petitioner is also serving a term for a conviction of grand theft in Los Angeles County which is not in question here.

In this habeas corpus proceeding petitioner contends that he is being subjected to multiple punishment for a single act or course of criminal conduct in violation of Penal Code section 654. **[1]** Since the objective of each burglary of which he was convicted and sentenced was the commission of a grand theft of which he was also convicted and sentenced, the Attorney General concedes that sentencing petitioner for both grand theft and burglary in each case was improper. (*People* v. *McFarland,* 58 Cal.2d 748 [26 Cal.Rptr. 473, 376 P.2d 449].) Since the punishment for grand theft is less than the punishment for burglary, the sentences for grand theft must be set aside. (*People* v. *McFarland, supra,* 58 Cal.2d 748, 762-763.)

[2] Petitioner also contends that section 654 precludes sentencing him for more than one crime committed in San Diego County, on the ground that the two burglaries and the two grand thefts were committed pursuant to a single conspiracy. In *In re Cruz, ante,* p. 178 [49 Cal.Rptr. 289, 410 P.2d 825], we held that two otherwise separate crimes could each be punished, even though they were both committed pursuant to one conspiracy. We also held that a defendant cannot be punished for both a substantive offense and a conspiracy to commit it unless the conspiracy had an unlawful objective in addition to the commission of the substantive offense. Under these rules petitioner may be punished for both burglaries, for they were separate crimes committed at different times and places and against different victims.

[3, 4a] Three overt acts were charged in the San Diego indictment, the two burglaries and possession of the goods stolen in the burglaries. These acts were all committed in furtherance of the conspiracy to commit the thefts, for which petitioner cannot be punished in addition to being punished for the burglaries. Accordingly, unless the conspiracy had a broader objective than the commission of the burglaries and

[1]Under Penal Code section 669, the sentences for the San Diego County offenses run concurrently with the sentences for the Kern County offenses.

thefts, petitioner cannot be punished for the two burglaries and also for the conspiracy.

The Attorney General contends that the conspiracy had a wider scope than the alleged overt acts would indicate and had a broader objective than the commission of the two burglaries and related thefts of which petitioner was found guilty. He contends that the purpose of proving overt acts is not to show the scope of the conspiracy, but merely to show that the criminal activity went beyond a corrupt agreement. (See *People* v. *Saugstad,* 203 Cal.App.2d 536, 549-550 [21 Cal.Rptr. 740]; *Yates* v. *United States,* 354 U.S. 298, 334 [77 S.Ct. 1064, 1 L.Ed.2d 1356].) In the present case, however, petitioner was not charged with a conspiracy having a broader objective than the commission of the substantive crimes charged. Although evidence of other crimes was introduced, the trial court instructed the jury that such evidence could be considered to show identity, motive, intent, ability, knowledge, or a common scheme only with respect to the crimes charged and that it could not be used to prove "distinct offenses or continual criminality." (See CALJIC No. 33.) Accordingly, under the instructions given, the jury could not have found petitioner guilty of a conspiracy having a broader objective than the one charged.

The question remains whether the sentence on the conspiracy count or the sentence on one of the burglary counts should be set aside. The punishment for conspiracy to commit a felony is the same as the punishment for the felony itself. (Pen. Code, § 182.) **[5]** Although the jury was not instructed to find whether petitioner conspired to commit the felony of grand theft or the misdemeanor of petty theft, it is clear that it found him guilty of conspiring to commit grand theft, for it convicted him of the substantive crimes of grand theft.

[4b] The punishment for conspiring to commit grand theft is imprisonment in the state prison for not more than 10 years (Pen. Code, § 489), and the punishment for burglary in the second degree is imprisonment in the state prison for not less than one and not more than 15 years (Pen. Code, § 461). Since the punishment for conspiring to commit grand theft is the lesser, it must be set aside.

The sentence for grand theft in Kern County is set aside. The sentences for grand theft and the sentence for conspiring to commit theft in San Diego County are also set aside.

[6] Petitioner is not entitled to release, however, since he is held under other valid judgments of conviction. The order to show cause is therefore discharged and the petition for a writ of habeas corpus is denied.

McComb, J., Peters, J., Tobriner, J., Peek, J., Burke, J., and White, J.,* concurred.

[Crim. No. 9944. In Bank. July 7, 1966.]

In re MARGARET LOUISE McCARTNEY on Habeas Corpus.

[1] **Criminal Law — Former Jeopardy — Offenses of Different Degrees—Conviction of Included Offense: Homicide—Defenses.** —Defendant's conviction of second degree murder at her first trial was an acquittal of first degree murder, and her conviction of manslaughter at her second trial was an acquittal of second degree murder.

[2] **Id.—Former Jeopardy—Offenses of Different Degrees—Conviction of Included Offense: Homicide — Charging Offense — Conviction of Included Offenses.**—An indictment or information charging murder also charges all lesser offenses necessarily included in the crime of murder, including voluntary and involuntary manslaughter (Pen. Code, § 1159); and one who has been charged with murder, convicted of manslaughter, and had his conviction reversed on appeal, may be retried for manslaughter on the original indictment or information.

[3] **Homicide—Limitation of Prosecution.**—Where an information charging murder was filed before the three-year period had run against manslaughter, following the reversal of defendant's conviction of second degree murder in the first trial and the reversal of her conviction for manslaughter in the second trial, she could be tried under the original information for manslaughter though the three-year period had then run or she could move to have the information amended to reflect that she could be convicted of no higher offense than manslaughter.

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[3] See **Cal.Jur.2d**, Homicide, § 311; **Am.Jur.**, Homicide (1st ed § 572).

McK. Dig. References: [1] Criminal Law, § 145; Homicide, § 28; [2] Criminal Law, § 145; Homicide, § 48; [3] Homicide, § 2.

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.